

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

MICHAEL BRACKETT

Plaintiff,

v.

MOONEY CONSTRUCTION, INC.

Defendant.

CIVIL ACTION FILE  
NO. 1:09-CV-1927-WSD

ATLANTA, GEORGIA

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WILLIAM S. DUFFEY, JR.,  
UNITED STATES DISTRICT JUDGE

Wednesday, January 6, 2010

APPEARANCES OF COUNSEL:

For the Plaintiff:

CROWLEY CLARIDA & HEAD LLP  
(By: C. Andrew Head)

For the Defendant:

WIMBERLY LAWSON STECKEL  
SCHNEIDER & STINE  
(By: Raymond Perez)

*Proceedings recorded by mechanical stenography  
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NICHOLAS A. MARRONE, RMR, CRR  
1714 U. S. Courthouse  
75 Spring Street, S.W.  
Atlanta, GA 30303  
(404) 215-1486

Wednesday Morning Session

January 6, 2010

12:01 p.m.

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P R O C E E D I N G S

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(In chambers:)

THE COURT: This is a discovery hearing in Brackett  
v. Mooney Construction, which is Civil Action No. 09-1927.

Mr. Head is here for Mr. Brackett. Who is  
Mr. Head, because I don't think we've met?

MR. HEAD: That's me, Your Honor.

THE COURT: And Mr. Perez is here for Mooney.

MR. PEREZ: Yes.

THE COURT: What kind of construction does Mooney  
do?

MR. PEREZ: They are a construction management  
company, and they work with various public and private  
entities in the construction of whatever kind or type  
projects. For instance, the project that Mr. Brackett was  
assigned to was a fire station, for instance, for the  
Atlanta, Fulton County District.

So, you know, they do all kinds of residential,  
commercial kind or type construction projects.

THE COURT: And what was Mr. Brackett's job with

1       them?

2                   MR. PEREZ:   He was a managing site  
3       superintendent.

4                   And essentially the company is broken down amongst  
5       I think like six to seven to eight managing site  
6       superintendent type employees, and basically they assign that  
7       site superintendent to be pretty much the company  
8       representative at the construction site.

9                   And they are pretty much in control of the complete  
10      day-to-day operations of the construction.   So they set the  
11      schedules, they help find the subcontractors that perform the  
12      actual labor on the project, they work with the owners, the  
13      architects, make design changes to the plan, get government  
14      permits, do work site safety, all those different things, and  
15      coordinates the material, the budgeting, all those types of  
16      aspects of the job.

17                  THE COURT:   All right.   Let's go back to where we  
18      were in December.

19                  In December there was I guess some processing of  
20      discovery issues.   We had I think a telephone hearing on  
21      that.

22                  MR. HEAD:   Yes, sir, December 9th.

23                  THE COURT:   The result was that I allowed the  
24      defendant to serve their responses, and then they were  
25      required to produce documents on the 16th.

1 MR. PEREZ: Correct.

2 THE COURT: I think the responses were filed on  
3 time.

4 MR. PEREZ: Correct.

5 THE COURT: But the documents were not produced on  
6 time.

7 MR. PEREZ: No. I know I had a previous  
8 conversation with Mr. Head from the very beginning that, you  
9 know, part of the document production -- we had produced in  
10 fact a number of documents even before we had filed the  
11 written responses to his discovery request, but in our  
12 responses we also did mention that there were certain items  
13 that would be available at a mutually convenient time for  
14 inspection at the office.

15 And I know Mr. Head and I had talked about that  
16 previously, that that was something that he would want to  
17 avail himself to, especially in light of the fact that the  
18 documents he's requesting would, you know, number in the  
19 thousands related to employment that, you know, would have  
20 lasted seven months in total.

21 THE COURT: Well, let's step back a second.

22 MR. PEREZ: Sure.

23 THE COURT: You understood that the Court ordered  
24 you to produce the documents by December 16th?

25 MR. PEREZ: You know, I did go back and read it,

1 and I did see where it said documents.

2 And I guess I presumed that when you said the  
3 interrogatory responses were due on I believe that  
4 Wednesday or Friday, I believe, I thought you meant the  
5 written responses to the interrogatories. And when you said  
6 to provide the discovery requests for the documents,  
7 I thought you meant the written responses to the document  
8 request.

9 And that's why, you know, we set it up where we had  
10 the written responses to the document production request, and  
11 then that's what we had provided. And in some of those cases  
12 we said, you know, that certain documents would be available,  
13 you know, for inspection at the office, and then we worked  
14 with Mr. Head to set up a date to come by, to actually  
15 facilitate that inspection.

16 So there might have been a misunderstanding on my  
17 part from what you actually were requiring us to produce at a  
18 certain time.

19 THE COURT: Well, let's see what the docket says.

20 MR. PEREZ: Sure.

21 THE COURT: While we are waiting for that, what --  
22 so that's now about three and a half weeks ago. Are all the  
23 documents -- have they been produced?

24 MR. PEREZ: One of the things that came up --

25 THE COURT: In order so that the record is clear,

1 can you answer that yes or no?

2 MR. PEREZ: Okay, what was the question again?

3 THE COURT: Have all of the documents been  
4 produced?

5 MR. PEREZ: No.

6 THE COURT: All right. Why is that?

7 MR. PEREZ: During the mediation from last week, it  
8 came to my attention -- and in fact, my client had also,  
9 I think in good faith, they just kind of had forgotten that  
10 Mr. Brackett had also worked at another project site  
11 briefly during the beginning of his employment before he  
12 really started to gear up on that fire station that he  
13 worked on. So there were some records -- and Mr. Head has  
14 alluded to them -- of another project site that he worked  
15 at.

16 And so during the previous production of  
17 documents, we did allow -- you know, we presented all the  
18 documents related to the fire station that he primarily  
19 worked on, but there is a separate fire station that he also  
20 worked on briefly at some point during the beginning of his  
21 employment that we have not provided documents to.

22 Now, from what I understand from my client, those  
23 records don't really possess any relevant information related  
24 to Brackett, but certainly to the extent that he worked out  
25 there and, you know, certainly to the extent that any of

1 those records may indicate as such, you know, we will  
2 certainly allow them open for inspection.

3 But in fact, most of the records produced for that  
4 Fire Station 13 that he did work at, some of those records in  
5 his own handwriting denotes times where he went to that other  
6 work site to perform, you know, whatever little daily duties  
7 that he may have done over there also during that time  
8 period.

9 So there is a discrepancy on this other work site  
10 that he may have performed some work on during the early part  
11 of his employment.

12 THE COURT: Let me give you the docket entry and  
13 ask you to read the underlined portion, and then tell me why  
14 you think that's ambiguous.

15 MR. PEREZ: Defendant shall produce these documents  
16 no later than 10:00 a.m. Wednesday, December the 16th, 2009.

17 And certainly when I did read back through this, I  
18 don't believe that it -- it was ambiguous I think in the  
19 sense that from our conversation during the mediation or the  
20 telephone conference --

21 THE COURT: Let's stick with the questions I ask.

22 MR. PEREZ: Sure.

23 THE COURT: That was the docket entry that was of  
24 record in this case --

25 MR. PEREZ: Yes.

1 THE COURT: -- publicly sent to you as to the  
2 conclusion and what was ordered at the hearing that we held  
3 over the telephone.

4 Do you agree that you were under court order to  
5 produce documents by 10:00 a.m. on December 16th according to  
6 that docket entry that was sent to you?

7 MR. PEREZ: Yes, according to this docket entry,  
8 yes, I would agree with that.

9 THE COURT: So by not producing the documents by  
10 10:00 on December 16th and as of today not having produced  
11 all the responsive materials, do you accept that you are in  
12 violation of a court order?

13 MR. PEREZ: You know, based on those statements,  
14 yes.

15 THE COURT: All right. Now, what is left to be  
16 produced?

17 MR. PEREZ: Mr. Head did provide us a list of the  
18 items that he wanted.

19 For instance, from his first inspection, he had  
20 denoted certain ones that he wanted copied, and my client  
21 sent them out to a copying company, and they have made those  
22 copies and they are available now to be picked up.

23 THE COURT: When were those flagged as wanting to  
24 be copied?

25 MR. PEREZ: I believe it was December 22nd.



1           Was it the 22nd that the inspection --

2           THE COURT: Why has it taken your client that long  
3 to copy and produce documents?

4           MR. PEREZ: Well, no, I think Mr. Head, when he  
5 originally went for that inspection, he had flagged out  
6 certain ones and he --

7           THE COURT: So why weren't those immediately copied  
8 for him?

9           MR. PEREZ: Well, from what I understand when  
10 I talked to my client, he had flagged them and had indicated  
11 that he wanted us to produce them at the deposition, and that  
12 subsequently after the mediation conference, he then  
13 contacted me again letting me know some of the additional  
14 items that were not available.

15           THE COURT: And who told you that at your client?

16           MR. PEREZ: It was a Lisa Bussie. She's like the  
17 secretary that works there, and she was there when Mr. Head  
18 was present during the inspection.

19           THE COURT: So Ms. Bussie represented to you that  
20 Mr. Head instructed her that he did not need the documents  
21 until the deposition was to be conducted?

22           MR. PEREZ: That's the information that she  
23 provided, that he had --

24           THE COURT: Is that true, Mr. Head?

25           MR. HEAD: I don't know if it's true that she

1 provided that information, but I think -- your question is is  
2 that what I told her?

3 THE COURT: Is that what you told her?

4 MR. HEAD: No, that's not what I told her. In  
5 fact, I was very --

6 THE COURT: Just tell me what you told her.

7 MR. HEAD: Okay. The only thing I told her was --  
8 I asked her two questions. Are these the only documents  
9 being produced? And she said, Yes, they are.

10 And I said, Where is the construction log book for  
11 Fire Station 18? She said, I didn't know you wanted that.

12 I was very uncomfortable talking to his client. He  
13 wasn't present; they wouldn't let him be present. And that's  
14 it. I flagged documents and left.

15 THE COURT: Your client wouldn't let you be present  
16 at the production?

17 MR. PEREZ: Correct.

18 THE COURT: Is the reason why they are trying to  
19 save money?

20 MR. PEREZ: I believe that that's part of the  
21 problem, Your Honor. And that's kind of why we are where we  
22 are at today.

23 And I think I have finally gotten my client on  
24 track, but certainly from the very onset of this case, they  
25 were very I guess frustrated with the process. They wanted

1 this thing to be done and taken care of from the very  
2 beginning, and it took me a while to get them to understand  
3 the seriousness of this nature -- the seriousness of  
4 complying with the discovery orders, the seriousness of  
5 producing the documents in a timely matter.

6 And from the original inspection, they didn't want  
7 me present, and again I believe it was because of a cost  
8 saving. They are like, Well, we didn't want you there.

9 And I told them -- and it's through e-mail  
10 correspondence -- I said, It's highly advised that I am there  
11 so that I can facilitate this process in case any issues come  
12 up. And they said, No, we don't want you there.

13 THE COURT: All right. When will all of the  
14 documents be produced?

15 MR. PEREZ: From what I understand -- I talked to  
16 my client today. They went through the list that Mr. Head  
17 provided --

18 THE COURT: You have to speak today on behalf of  
19 your client.

20 MR. PEREZ: Okay.

21 THE COURT: I want you to tell me as a  
22 representative of your client -- because I'm afraid that what  
23 you say is, I understand from my client, and then you will  
24 call back and say, Well, my understanding was wrong.

25 We are going to reach some finality on some things

1 today. So when will the documents be produced?

2 MR. PEREZ: The documents are available today for  
3 inspection, and Mr. Head has the opportunity to go and flag  
4 out any additional ones he wants. He can either have them  
5 copied or we can have them copied for him.

6 There is only one item that remains not at the main  
7 office to be reviewed that Mr. Head has specified, which is  
8 that green book which relates to Fire Station No. 18.

9 THE COURT: And where is that?

10 MR. PEREZ: And that's a book that's maintained on  
11 the actual construction site. And again, just based on the  
12 way the --

13 THE COURT: And where is the construction site?

14 MR. PEREZ: You know, I don't know the exact  
15 location, but it's not near the main office in  
16 Woodstock. Like I did ask them, Well, is it close by where  
17 you can --

18 THE COURT: I don't need to hear -- let's just cut  
19 to the chase. You will produce all documents and you will  
20 arrange to have those that are flagged copied, and those will  
21 be in Mr. Head's hands -- well, the production will be made  
22 no later than noon tomorrow, and the copies will be provided  
23 no later than Friday morning at 9:00.

24 MR. PEREZ: Okay. Copies --

25 THE COURT: And your client will be responsible for

1 having available by noon tomorrow this book that you have  
2 just described.

3 So your client is being ordered, one, to produce  
4 every document that remains to be produced no later than  
5 noon tomorrow, and those that are designated for copying will  
6 be delivered to Mr. Head no later than 9:00 on Friday  
7 morning.

8 And if that is not met, your client will be  
9 sanctioned.

10 MR. PEREZ: Okay.

11 THE COURT: Are there any other outstanding  
12 document issues?

13 MR. HEAD: Yes, Your Honor. Just as to documents,  
14 we have got objection issues, requests to --

15 THE COURT: We will talk about those in a second.

16 MR. HEAD: Okay.

17 THE COURT: As far as what has agreed to be  
18 produced and the timely production, is there anything else?

19 MR. HEAD: A couple points. One would be that we  
20 currently had three depositions in a row for today, tomorrow  
21 and Friday.

22 THE COURT: I'm not to depositions. I'm just  
23 talking about documents.

24 MR. HEAD: Well, the reason I brought that up is  
25 because I would like before the plaintiff is deposed to

1 have the opportunity to review --

2 THE COURT: You need to also just answer my  
3 questions. With respect to the documents that are going to  
4 be made available or that you have already copied, are there  
5 any other issues now that you have a deadline for receiving  
6 that which is agreed to be produced?

7 MR. HEAD: Two issues, Your Honor. One would be  
8 logistics of the copying, which is my vendor or theirs. And  
9 then two is --

10 THE COURT: I've told -- you need to listen too.  
11 I told him that he's responsible for delivering to you copies  
12 by 9:00 on Friday morning. I don't care how he does  
13 that. If he wants to call and ask you to arrange for it,  
14 that's fine; he will just have to pay for it. But I suspect  
15 it would probably be cheaper for him to find somebody to copy  
16 them and give them to them.

17 But that's your responsibility.

18 MR. PEREZ: Okay.

19 MR. HEAD: Okay. To answer your question, then,  
20 Your Honor, as to the documents that he has said we will make  
21 available and that we are not objecting to, I don't know that  
22 there are any other issues based on what you ordered unless  
23 and until of course I see what they did.

24 THE COURT: All right. The remaining issue on the  
25 timely production of documents that were required to be

1 produced and are being produced is that the defendant is in  
2 violation of the Court's September order by not making the  
3 production in a timely manner and specifically in not making  
4 the production by 10:00 on December 16th.

5 So I'm going to give the plaintiff an opportunity  
6 to submit a pleading showing with respect to the documents  
7 that were agreed to be produced any fees and expenses they  
8 incurred to get the defendant's compliance, and then I will  
9 consider whether it's reasonable to require the defendant to  
10 reimburse them their fees.

11 I think that covers the issues about the discovery  
12 of documents that were agreed to be produced. The next is  
13 the scope of the requests.

14 I assume this pertains to document requests; is  
15 that right?

16 MR. HEAD: Yes, Your Honor.

17 THE COURT: So does anybody have a copy of the  
18 document requests and the objections that were asserted?

19 MR. HEAD: Yes, Your Honor.

20 There is two ways -- I think, and I will leave it  
21 up to you, but I think the easiest way to look at it is I  
22 made bullet-point summaries --

23 THE COURT: I'm -- just let me see the discovery  
24 itself.

25 MR. HEAD: Here is defendant's responses to

1 plaintiff's request for production.

2 THE COURT: Does this have the request as well?

3 MR. HEAD: Yes, it cites them in front of each.

4 THE COURT: So I'm looking at a December 16th cover  
5 letter sent by Mr. Perez to Mr. Head, attached to which are  
6 Defendant Mooney Construction, Inc.'s Response to Plaintiff's  
7 First Requests for Production.

8 So let's go to page two.

9 Do you have a copy of that, Mr. Perez?

10 MR. PEREZ: I do.

11 THE COURT: Let's go to page two. The first  
12 request is set forth at the top of page two. Are there any  
13 concerns about the response to the first request?

14 Well, first, are you withholding anything,  
15 Mr. Perez, that is responsive to the first request based upon  
16 your objections?

17 MR. PEREZ: No.

18 THE COURT: All right. So you are representing to  
19 me that the defendant is going to make a full and complete  
20 production, is not relying upon anybody objections to Request  
21 No. 1; is that right?

22 MR. PEREZ: That is correct, Your Honor.

23 THE COURT: All right. Mr. Head, that seems to  
24 resolve Request No. 1. Do you agree?

25 MR. HEAD: I agree.



1           THE COURT: Let's go then to Request No. 2. This  
2           is a request to produce documents -- I guess what the  
3           plaintiff is requesting, that they get a production by  
4           groupings, so any documents that support a specific defense  
5           be identified as being a document that is in support of a  
6           defense and that that be done for all defenses. Is that  
7           correct?

8           MR. HEAD: That is correct, that's what we are  
9           requesting.

10          THE COURT: All right. That's an improper  
11          request.

12          A document production under Rule 34 is required to  
13          be made in two ways, one is either by category or as they are  
14          maintained in the ordinary course of business.

15          This imposes a production requirement that is not  
16          attendant to Rule 34, and therefore I am not going to require  
17          a production to Request No. 2 based upon the manner in which  
18          the plaintiff has required it to be made.

19          Next then is Request No. 3, produce all documents  
20          regarding the defendant's corporate structure, i.e.,  
21          reporting structure, organizational chart, throughout the  
22          relevant period.

23          And the relevant period is defined as what?

24          MR. HEAD: During --

25          THE COURT: Is that a defined term in your

1 request?

2 MR. HEAD: Yes, it's a defined term in this  
3 request.

4 THE COURT: Do you understand that there is a  
5 defined term for the relevant period, Mr. Perez?

6 MR. PEREZ: Yes.

7 THE COURT: All right. So since you agree that  
8 there is a defined period, has the defendant withheld any  
9 documents that are responsive to Request No. 3?

10 MR. PEREZ: No. My client does not possess  
11 documents that are responsive to that request.

12 THE COURT: All right. They can only produce what  
13 they have. The representation to me is that there isn't --  
14 that there aren't any responsive documents, meaning that they  
15 have complied.

16 MR. HEAD: Right. And for clarification, for these  
17 questions, I take it what you are asking is not have you  
18 withheld to this point, but are you withholding up till  
19 tomorrow's date?

20 THE COURT: Right.

21 MR. HEAD: Okay.

22 THE COURT: What I'm saying is there is going to be  
23 a production that's required to be made by noon tomorrow, and  
24 I just want to make sure that when I say are you going to  
25 produce materials responsive to these requests, what I'm

1 saying is have you already done it or are you going to do it  
2 by noon tomorrow.

3 MR. PEREZ: Yes.

4 MR. HEAD: Okay.

5 THE COURT: And if any of these requests, Mr. Head,  
6 you are not concerned about, tell me that and I will just  
7 skip those.

8 MR. HEAD: Okay.

9 THE COURT: All right. So the next would be four,  
10 produce all documents regarding defendant's incorporation,  
11 election or appointment of officers and/or directors, and  
12 corporate ownership.

13 Are there any documents being withheld based upon  
14 objections to this request?

15 MR. PEREZ: Yes, Your Honor.

16 THE COURT: And what is that?

17 MR. PEREZ: The basis of our objection is the fact  
18 that these requested materials are immaterial and irrelevant  
19 and premature and not likely to lead to the admissible  
20 evidence in this case.

21 THE COURT: How are these relevant to a wage  
22 dispute?

23 MR. HEAD: Well, Your Honor, you need to know who  
24 is the owner and who controls policy for good faith --

25 THE COURT: Why?

1 MR. HEAD: -- for their good faith knowledge.

2 Here a potential scenario.

3 THE COURT: Well, what does that have to do with  
4 the process for the -- I mean, this says produce all  
5 documents regarding, among other things, how they elect and  
6 appoint officers. It doesn't really -- that's not relevant  
7 to this case. Their process for doing that seems to me to be  
8 irrelevant.

9 To the extent that you are asking to identify  
10 people who during the relevant period were officers and  
11 directors --

12 MR. HEAD: Exactly.

13 THE COURT: -- which is not what this request is,  
14 it goes far beyond that -- I think you are entitled to know  
15 that.

16 Of course, there is publicly-available information  
17 at the Secretary of State's website that would identify some  
18 of those people. But it would seem to me reasonable for the  
19 defendant to produce for the relevant period who the officers  
20 and directors of the corporation were to the extent that  
21 that's in a document. If it's not in a document, you have no  
22 requirement to create a document to produce it.

23 All right. So does that satisfy what you really  
24 want in response to Request 4?

25 MR. HEAD: Other than identifying the owner, that

1 would be it. I mean, they are --

2 THE COURT: It's a corporation; right?

3 MR. HEAD: It's a privately-held company.

4 THE COURT: It's a corporation, though.

5 MR. HEAD: Yes, it's a corporation. Their  
6 corporate disclosure says that there is only one -- as far as  
7 I could tell, there is only one owner. I just need a  
8 document that tells me that.

9 THE COURT: What kind of corporation is it? Is it  
10 a C Corp or an S Corp?

11 MR. PEREZ: You know, I'm not sure, Your Honor.

12 THE COURT: Well, would you agree to provide him  
13 who the shareholders of the company are?

14 MR. PEREZ: Sure. If we have that information, we  
15 will provide that.

16 THE COURT: Well, somebody is going to have that  
17 information considering they are required to hold shareholder  
18 meetings.

19 MR. PEREZ: Okay.

20 THE COURT: And you will provide him that  
21 information by noon tomorrow.

22 MR. PEREZ: Yes, Your Honor.

23 MR. HEAD: Okay. Five I think we can skip because  
24 he says there is nothing else.

25 THE COURT: Okay. Six?

1 MR. HEAD: Six I believe we can skip because he  
2 says none exist.

3 THE COURT: Okay, seven?

4 MR. HEAD: I will go ahead and answer that I really  
5 can't tell from the response whether there is something there  
6 to be produced. It seems to be saying there is nothing, but  
7 we will make it available.

8 THE COURT: This essentially asks for any documents  
9 that reflect any person's claim that they were entitled to  
10 overtime pay.

11 MR. HEAD: As to Request No. 7, on December 31st  
12 Mr. Perez told me --

13 THE COURT: Well, let me ask Mr. Perez.

14 MR. HEAD: -- we will confirm.

15 THE COURT: Are there any written documents that  
16 would evidence complaints that people had about their  
17 overtime compensation not being paid?

18 MR. PEREZ: No, Your Honor.

19 THE COURT: All right. So if there are none,  
20 I'm assuming that's -- that is to me representation that a  
21 production will be made, but in this case there is nothing to  
22 produce.

23 MR. PEREZ: Correct.

24 THE COURT: All right. Paragraph 8, produce each  
25 document regarding or related to the decision to deny

1 plaintiff the overtime requested in plaintiff's complaint  
2 through the present.

3 Are there any documents relating to any requests  
4 that the plaintiff made for overtime compensation?

5 MR. PEREZ: No, Your Honor.

6 THE COURT: So there are no documents responsive to  
7 this request.

8 Paragraph 9. Are these or will these documents be  
9 produced by tomorrow at noon?

10 MR. PEREZ: Yes, Your Honor. Most of these  
11 documents have been produced or provided for inspection, and  
12 certainly if there is -- Mr. Head has had an opportunity to  
13 review them and they have been produced.

14 THE COURT: All right. So with respect to Request  
15 No. 9, a complete production will be made no later than  
16 tomorrow at noon, and it could be that a complete production  
17 has already been made. But if not, it will be made tomorrow  
18 by noon.

19 All right. Next is produce every e-mail sent  
20 regarding plaintiff using defendant's e-mail system or sent  
21 by any member of defendant's management from any other e-mail  
22 system during his employment with defendant.

23 I'm not sure I understand what that is asking.

24 MR. HEAD: Every e-mail that the plaintiff sent or  
25 every e-mail that someone at defendant sent about the

1 plaintiff. That's usually where you find out --

2 THE COURT: So if somebody sent an e-mail that said  
3 the plaintiff would like for everybody to go to lunch on  
4 Thursday, you are demanding that that be produced?

5 MR. HEAD: Believe it or not, Your Honor, before  
6 you blow up that idea, that would be a perfect example of  
7 something related to hours worked.

8 In these wage-and-hour cases, what we have is we  
9 have plaintiff's testimony and the records of what he noted  
10 as his hours worked, and often what you find is, you know,  
11 there is very few -- I think there is only one or maybe two  
12 people that are going to send any e-mails about the  
13 plaintiff, and they will be saying plaintiff just repaired  
14 so-and-so on the job site, plaintiff is responsible for  
15 fixing the railings at the Fire Station 13.

16 That's the kind of thing you are looking for,  
17 because it tells you what the plaintiff was actually doing as  
18 his job duties rather than what was announced at the  
19 beginning of what they --

20 THE COURT: Well, what's the defendant's position  
21 in the case, that he's not qualified for -- that he's exempt  
22 from overtime?

23 MR. PEREZ: Correct, that he was either an  
24 executive, administrative or professional exempt employee.

25 THE COURT: So are you contesting -- is the



1 defendant contesting that he worked overtime?

2 MR. PEREZ: No, no, Your Honor. But we do contest  
3 the number of hours worked on a daily and weekly basis.

4 THE COURT: Well, you need to narrow this. I mean,  
5 there are obviously going to be e-mails in there that don't  
6 relate to -- if he sent an e-mail saying, Here is my mother's  
7 number, can you give her a call --

8 MR. HEAD: I understand where you are going,  
9 Your Honor. The problem I've had with that is when the  
10 defendant is the one who decides -- let say it's narrowed to  
11 something related to his job duties or work performed, when  
12 the defendant is the one that looks through the e-mails and  
13 decides I think this relates to his job duties or work  
14 performed, I don't get a chance to make that review.

15 THE COURT: Well, you never do. I mean, that's the  
16 process of discovery is that a lawyer representing the client  
17 is the one that has the responsibility --

18 MR. HEAD: Sometimes we get to do a keyword search.

19 THE COURT: Well, what are the keywords that you  
20 would like searched?

21 MR. HEAD: First of all, I think it's clear that  
22 any e-mail from his direct supervisor is not going to be so  
23 broad as to be a problem. It's a small -- a real small  
24 company. We're not -- this is not a Coca-Cola case.

25 I mean, if Mr. Perez would help me out, I don't

1 believe there is more than one or two managers that would be  
2 sending any e-mails about the plaintiff here.

3 MR. PEREZ: And he is correct.

4 In fact, just so we clarify, I mean, we are not  
5 really objecting necessarily to e-mails related to  
6 Mr. Brackett's employment there. In fact, Mr. Brackett did  
7 not have an e-mail account with the company. He did not have  
8 a computer that I know of that was at the site. So it's not  
9 like he was regularly sending e-mails back and forth.

10 And e-mails that were being sent in relation to his  
11 project have been printed out and are available for  
12 inspection and were available previously as related to that  
13 project that he was working on.

14 MR. HEAD: But a good example, if the City of  
15 Atlanta or the architect or someone on the project sends an  
16 e-mail to the plaintiff and so-and-so that's asking for a  
17 status report of what's happening and they respond and the  
18 plaintiff is copied on that that says here is everything that  
19 has been done on the site --

20 THE COURT: But the plaintiff is not going to be  
21 copied because he doesn't have a computer.

22 MR. HEAD: Well, he actually has been copied on  
23 some of those e-mails, Your Honor. And I understand that  
24 when you hear that, you think there is not any e-mails.

25 THE COURT: Well, does he have it? Did he ever get

1 work e-mails?

2 MR. HEAD: He had a *Yahoo.com* account, and  
3 occasionally he was copied on those. I can pull those from  
4 the *Yahoo!* account.

5 THE COURT: So he can get all those. I mean, those  
6 are within your control.

7 MR. HEAD: To the extent he hasn't deleted any of  
8 them, he can get his. I always want to get those from the  
9 other side in case he's deleted some.

10 But what I can't get are ones between other people  
11 about him, saying Mike Brackett is responsible for doing  
12 this, Mike Brackett is going to have to work until 10:00 p.m.  
13 tomorrow, those kind of things.

14 So this is such a small company and so few people  
15 involved in the e-mail that this is a different request than  
16 what I would make if I was asking the executive VP at  
17 Coca-Cola for all their e-mails.

18 THE COURT: Do you have a server? Does the company  
19 have a server?

20 MR. PEREZ: I'm not sure, Your Honor.

21 THE COURT: Have you looked into how hard it would  
22 be just to produce all the e-mails to the extent that they  
23 still exist?

24 You want all the e-mails sent by what people  
25 specifically?

1 MR. HEAD: His project manager.

2 THE COURT: Who is that?

3 MR. HEAD: Jerry Lyons.

4 THE COURT: Who else?

5 MR. HEAD: I think Timothy Mooney. And there is  
6 one other management individual, Kevin.

7 THE COURT: Kevin what?

8 MR. HEAD: And I'm sorry, do you recall Kevin's  
9 last name?

10 MR. PEREZ: I do not.

11 MR. HEAD: Kiker? I'm not sure. I only know from  
12 his -- I am recalling what his e-mail address is, and it's  
13 Kevin something.

14 But basically, you know, if you said that the  
15 management employees who would be responsible for  
16 communicating with the plaintiff about his work on those two  
17 job sites, that would be --

18 THE COURT: Well, he should know that. Who are the  
19 management employees that communicated with him with respect  
20 to his job?

21 MR. HEAD: I think it's those three that  
22 communicated with him. I don't know internally whether  
23 anyone else communicated about him. But I would -- if you  
24 were to provide that, that would be fine with me.

25 THE COURT: All right. Would you then produce any

1 e-mails to or from or to which the plaintiff was copied from  
2 or to Mr. Lyons, Mr. Mooney and Mr. Kiker; that is, go  
3 through whatever storage they have of e-mails, and any e-mail  
4 that mentions or refers to the plaintiff, produce that.

5 MR. PEREZ: We can do that, Your Honor.

6 THE COURT: Okay. And I think that might take some  
7 more time. I'm going to give you until Friday morning to  
8 make copies of those and produce them. They don't have to  
9 actually be made available tomorrow at noon.

10 MR. PEREZ: Thank you, Your Honor.

11 THE COURT: That gives you another day or so to get  
12 that together.

13 MR. PEREZ: And just to clarify, Your Honor,  
14 though, just so we have it straight, you know, defendant  
15 obviously still maintains its client/attorney privilege in  
16 relation to any e-mails that were sent --

17 THE COURT: You are not required to produce --  
18 if there is attorney-client privileged material or work  
19 product material about this litigation, you are not required  
20 to produce that, and I don't think Mr. Head is requesting  
21 that.

22 MR. PEREZ: Okay.

23 MR. HEAD: That's correct.

24 THE COURT: All right. Eleven?

25 MR. HEAD: I think we can skip on -- well, I'm

1       sorry, eleven is grouped in with some of the earlier  
2       ones. Eleven is an important one.

3               Eleven is one of many having to do with job duties  
4       performed and hours worked. So I'm sorry, go ahead.

5               THE COURT: So these would just be any records that  
6       would show when he went to the work site or to the  
7       defendant's offices?

8               MR. HEAD: Uh-huh. Well, in a wage-and-hour case,  
9       you look for a couple things, and it's not present in this  
10      case as far as I know, but I need to ask.

11              Sometimes you have to key in and key out of a  
12      building or you have to pass a security gate that logs in the  
13      time you were there. That's Subsection No. 1.

14              Subsection No. 2 is you look for, okay, any  
15      time-stamped communication with somebody about the work you  
16      are doing. That could be sent e-mails by the plaintiff, that  
17      could be faxes that the plaintiff sent. Those kind of things  
18      tell you if he's sending a fax at 8:00 p.m., he is probably  
19      working at 8:00 p.m.

20              And number three, same thing, if there is some sort  
21      of log-in or clock-in that shows when he used their  
22      computers.

23              Now, one thing that would be present is their cell  
24      phone records, times that he used the company cell phone.  
25      That shows you, okay, when is he on the phone working.

1 That's what this request --

2 THE COURT: Well, that would show when is he on the  
3 phone.

4 MR. HEAD: Sure.

5 THE COURT: It wouldn't show when he's on the phone  
6 working.

7 MR. HEAD: Maybe, Your Honor. I don't think these  
8 two were friends, so I don't think they were talking, you  
9 know, about soccer games.

10 But, yes, Your Honor, that's what this request is  
11 looking for. Any sort of time-stamped document that says  
12 when he's communicating, and from that the parties can make  
13 their arguments.

14 THE COURT: Well, did he have a company phone or  
15 did he have his own phone?

16 MR. HEAD: He had a company-assigned cell phone,  
17 and I believe that the -- they made some cell phone -- they  
18 made cell phone records available. It's my understanding  
19 that those covered his cell phone number, but I haven't been  
20 able to bring them yet to my client to --

21 THE COURT: If there is any check-in, check-out  
22 system where a document is available showing when he came or  
23 left a work site or the defendant's facilities, you should  
24 produce that. My guess is that doesn't exist.

25 MR. HEAD: Yeah, it's a locked gate. It's a locked

1 gate on a construction site. He worked out at the site,  
2 so --

3 THE COURT: Then the other thing that would make  
4 any sense would be cell phone records. I would submit that  
5 they are going to be useless because -- but to the extent  
6 that there are cell phone records for the relevant time  
7 period showing calls made to or from the defendant's --  
8 I mean, the plaintiff's phone, you need to produce those.

9 MR. PEREZ: Certainly. We've already made a copy  
10 of them and they are available for production.

11 THE COURT: And I think the only issue is whether  
12 there is evidence of his phone usage, because it's his phone  
13 usage which would indicate whether he's on or off the  
14 job. So I don't think it makes any sense to require some  
15 other -- the records for somebody else's phone, because he  
16 either got a call or he didn't get a call.

17 MR. HEAD: Yes, it's his communications with  
18 defendant, so it would have to be his phone.

19 THE COURT: And then used or accessed defendant's  
20 computer -- documents indicating that he used or accessed  
21 defendant's computer or telephone system during his  
22 employment. Well, you are going to get the phone records, so  
23 I guess that's their telephone system.

24 But I think you said all he has is a *Yahoo!*  
25 account, so how would we --



1           MR. HEAD: I don't believe that he has a computer  
2           that he accessed or used their computer system. But I asked  
3           just to make sure I'm not wrong on that.

4           THE COURT: Well, assuming that he doesn't have,  
5           there is no log-in system or something, no record if he  
6           doesn't have a computer.

7           Check into that, if he did have a computer and  
8           there is some record showing when he logged off or logged  
9           on.

10          MR. PEREZ: I will confirm that with my client,  
11          Your Honor.

12          THE COURT: All right. You should produce that by  
13          tomorrow, but it sounds to me like that doesn't exist  
14          either.

15          MR. HEAD: Twelve and thirteen, nobody has  
16          identified any experts.

17          THE COURT: Okay.

18          MR. HEAD: We would be surprised if that happens,  
19          but I think we can move on from those.

20          THE COURT: Fourteen, if there are no experts,  
21          there is nothing reviewed.

22          MR. HEAD: Right.

23          THE COURT: Fifteen, have the documents described  
24          in 15, have they been produced?

25          MR. PEREZ: Yes, Your Honor, except to the extent

1 that we were discussing that he did perform some work at that  
2 other site.

3 Now, from my -- we do not believe that those  
4 records possess any records showing hours worked or his time  
5 out on this other facility. But certainly to the extent that  
6 he worked on this other site, we will and we are going to  
7 make those documents available for inspection.

8 THE COURT: By noon tomorrow.

9 MR. PEREZ: By noon tomorrow, yes.

10 THE COURT: All right, got it, okay.

11 MR. HEAD: Your Honor, as to payments to the  
12 plaintiff, all I have received and all I understand I'm going  
13 to be receiving is a three-page summary of payments. I don't  
14 have pay stubs or anything that might reflect here is the  
15 number of hours this payment is for. That might be  
16 important.

17 And then secondly, there was a bonus payment that  
18 affects his regular rate for overtime calculation  
19 purposes. All I have again is that three-page summary of  
20 here is what was paid, but I don't have any documents with  
21 that bonus or the check.

22 THE COURT: Who does your payroll? Do they do it  
23 inside or does ADT or some other company do it?

24 MR. HEAD: It's a third-party company.

25 MR. PEREZ: It is a third-party company.

1 MR. HEAD: I'm sorry, he can answer.

2 MR. PEREZ: This is the document that he's  
3 referring to, and this again was originally produced back on  
4 November 3rd, 2009.

5 THE COURT: Well, I think you have got to go to  
6 whoever this is, Time Plus Payroll, go back to them and just  
7 have them pull all the records about payment made to him and  
8 anything relating to this pay and how it was -- what's in  
9 their system to show what he was being paid for.

10 MR. HEAD: As to -- there is one bonus issue,  
11 Your Honor, six hundred dollar bonus in December of '08. I  
12 don't know whether that check came as it sometimes does with  
13 a memorandum or some note from the president that says  
14 attached is your bonus for a great job done.

15 THE COURT: Well, it seems awful inconsequential if  
16 it's only six hundred dollars. But is there any dispute that  
17 he was paid a six hundred dollar bonus?

18 MR. PEREZ: I think the only dispute would be that  
19 it wouldn't -- that compensation was a discretionary bonus  
20 payment and therefore it's not part of -- I mean, it's not  
21 part of the compensation that would be factored into overtime  
22 determination. That would be the only issue.

23 THE COURT: Well, you are going to need testimony  
24 on that.

25 MR. PEREZ: Correct.

1           THE COURT: Unless there is some document  
2 characterizing the reason why the bonus was paid.

3           MR. PEREZ: Okay.

4           MR. HEAD: If there is some document that came with  
5 the bonus, that's what I would be asking to see, that  
6 explains --

7           THE COURT: Well, what document does your client  
8 say came with the bonus?

9           MR. HEAD: He doesn't recall a document, but I  
10 don't -- my client, Your Honor, is a -- is a -- well, let me  
11 put it this way. I think it's often prudent to ask the  
12 defendant whether they sent any document that said here is  
13 what the bonus was for. I can just rely on my client's  
14 recollection, but I would like to see the defendant confirm  
15 my client's recollection. What if my client is wrong?

16          THE COURT: What does your client say it was for?  
17 He has no idea? It's just kind of --

18          MR. HEAD: No, he says it's for working hard this  
19 year.

20          But if what you are asking is what does my client  
21 say came with this bonus payment, he doesn't recall it coming  
22 with a note as you sometimes get from an employer that says  
23 here is your bonus which is a bonus for X reason. But  
24 I asked for it because I want to make sure.

25          THE COURT: Okay. Well, if that exists, you should

1 produce it by noon tomorrow.

2 MR. PEREZ: I will look into that, Your Honor.

3 THE COURT: All right. What's next? Personnel  
4 file, has that been produced?

5 MR. PEREZ: Yes, Your Honor. The personnel file  
6 for the plaintiff has been produced.

7 THE COURT: What else is the plaintiff looking for  
8 there?

9 MR. HEAD: I didn't get a chance to tell you that  
10 I think 16 is covered.

11 THE COURT: Sorry, okay. Seventeen.

12 MR. HEAD: Seventeen we do have a dispute about.

13 THE COURT: Well, I'm not going to do that. Why do  
14 you think you are entitled to the personnel files for these  
15 people?

16 MR. HEAD: Well, first of all, they are witnesses  
17 that are listed on Attachment A, and so to the extent that  
18 those documents contain impeachment materials, that's one  
19 thing you look for.

20 THE COURT: Like what?

21 MR. HEAD: Like Jerry Lyons is probably going to  
22 tell me one thing about what his prior experience was, but  
23 his application for employment might say another.

24 THE COURT: Okay. So you want their applications  
25 for employment?

1 MR. HEAD: Job application.

2 And also if there is anything in the personnel  
3 files -- I doubt we are going to find it here, but sometimes  
4 you find someone being disciplined for allowing someone to  
5 work overtime or for not paying someone for working  
6 overtime. There is something in their personnel file where  
7 somebody above them is saying, You need to change the way you  
8 are handling these employees and their overtime.

9 THE COURT: Okay.

10 MR. HEAD: And sometimes you find a disciplinary  
11 notice in there.

12 That's why for each witness they identify, I ask to  
13 see their personnel file. I really don't -- other than that,  
14 I really don't care about what elections they made for direct  
15 deposit.

16 THE COURT: Well, of course, that's what you  
17 requested.

18 So you don't have to produce the personnel files,  
19 but you should for these specific individuals produce their  
20 applications for employment, if there are any, and any  
21 notations in there where they were disciplined, counseled,  
22 criticized, or talked to about whether they were allowing  
23 people to work overtime when they shouldn't have.

24 MR. PEREZ: Certainly to the extent those documents  
25 exist, we can have them produced by tomorrow.

1           THE COURT: Okay. Is that satisfactory to the  
2 plaintiff?

3           MR. HEAD: Yes, Your Honor.

4           I just want to make sure we are all on the same  
5 page. There were some people identified two days ago in  
6 supplement to Attachment A. So my request would cover them.

7           THE COURT: It's whoever was initially or  
8 thereafter identified as a person who should have been on  
9 Attachment A. Do you understand that, Mr. Perez?

10          MR. PEREZ: Yes, Your Honor.

11          THE COURT: Okay. How about eighteen?

12          MR. HEAD: Eighteen we have a dispute  
13 about. Eighteen is saying, okay, now not for the  
14 plaintiff, but for the other people who did the same job  
15 as the plaintiff, produce the documents that relate to  
16 their hours worked and the job duties they actually  
17 performed and then how you paid them, did you pay them  
18 overtime or not.

19          THE COURT: Well, were there any other site  
20 superintendents that were paid overtime?

21          MR. PEREZ: No, Your Honor.

22          THE COURT: So if they are taking the position,  
23 which I would think they are, that they are all exempt  
24 employees and they don't pay them overtime -- I guess you  
25 ought to go through the other site superintendent files and

1 if you find that any of them were paid overtime, you ought to  
2 produce those.

3 MR. PEREZ: We can do that, Your Honor.

4 MR. HEAD: And then next as to job duties, this  
5 will go to the good faith defense that they have raised,  
6 which is of course their defense to liquidated damages. And  
7 I will probably see an argument that says -- or I might see  
8 an argument that says, Well, we didn't know that the  
9 plaintiff actually did all this construction labor, or  
10 actually that the plaintiff had no involvement in creating  
11 the schedules, et cetera.

12 But when you find -- when you obtain in discovery  
13 the fact that that's the same thing for every site  
14 superintendent, and there is only I think maybe it's between  
15 six and eight site superintendents, when you are able to show  
16 that that's the way they did things with every site  
17 superintendent, that helps me prove to you -- it just went  
18 out of my head whether you decide good faith or the jury, one  
19 decides willful and one decides good faith -- prove to the  
20 fact-finder on good faith that you can on the one hand be  
21 saying, Well, we had no idea that you actually had no  
22 involvement in these management type things and that you did  
23 a ton of construction work when in fact you show that  
24 everyone had the same thing and there is no way an employer  
25 couldn't know that all of their site superintendents were



1 doing this.

2 So that's why you ask for it. I've got the cases  
3 that say that -- that have granted the motions to compel for  
4 the plaintiff to get it, if you are interested in that? But  
5 that's what you are going for.

6 THE COURT: I don't understand what you are looking  
7 for.

8 MR. HEAD: Okay, I will give an example. There are  
9 these construction logs. They call them green books or daily  
10 logs, but that's where the company's sole laborer out there  
11 on the site, which is the site superintendent, is marking  
12 down what happened that day. And sometimes they will say, I  
13 had to replace the safety railings, I had to redo and dig the  
14 grading because the subcontractor messed up the grading, and  
15 they will list in there, Here is what I'm actually doing out  
16 there day in and day out.

17 And if I later on in this case when we are  
18 arguing about their good faith defense I get an argument  
19 from them that says, Okay, you are right, if he's  
20 non-exempt because he's actually doing all this  
21 construction work and that he actually didn't have the  
22 authorization to make these decisions and he had to  
23 instead get someone else to make them, I need the evidence  
24 at that point to say, And you knew from all the documents  
25 that you had that all of your other site superintendents were

1 doing the exact same thing, so don't tell the Court he's an  
2 anomaly and we had no idea.

3 THE COURT: So are you saying you want the green  
4 books from every project they have ever had?

5 MR. HEAD: It can be just during the  
6 period. I mean, that's what I asked for, at any time during  
7 the relevant period.

8 But they are a small company. There is only six or  
9 eight site superintendents. And his relevant period, he's  
10 only employed from June to December 2008.

11 THE COURT: He's only employed there six months?

12 MR. HEAD: Seven months, yeah, through the end of  
13 the year.

14 THE COURT: This is an overtime claim for seven  
15 months?

16 MR. HEAD: Yes, Your Honor.

17 I have got a whole speech prepared about how this  
18 case, if the defendant would have looked at its documents and  
19 not have played around like this, this case should have been  
20 resolved back when I sent the demand in September. It's a  
21 small case.

22 THE COURT: What is your speech if it's found that  
23 there is no case to have been brought? Then couldn't  
24 somebody say the case should never have been brought  
25 because --

1 MR. HEAD: Then this Court would be ruling  
2 differently than a number of district courts in this circuit  
3 who have ruled on this exact situation.

4 THE COURT: Well, only if you are right.

5 MR. HEAD: Correct, Your Honor, I believe I'm  
6 right. I believe -- I mean, a case that should be brought  
7 because it's right under the law and it's right under  
8 established decisions should be brought. At that point it's  
9 the defendant's obligation --

10 THE COURT: What do you mean by established  
11 decisions that you are talking about?

12 MR. HEAD: *Gotlieb* its progeny.

13 THE COURT: Well, with all due respect, I have two  
14 hundred civil cases. The wage-and-hour cases I have probably  
15 number ten. So I would like to say that I know *Gotlieb*, but  
16 I don't.

17 MR. HEAD: Right. I was going to tell you bullet  
18 points real quick. *Gotlieb* is on all fours with these  
19 facts except that my client actually did more construction  
20 labor.

21 What you haven't heard is that there are no  
22 employees of the company other than the plaintiff out at the  
23 job site every day. He's the worker. So executive exemption  
24 is out; he's not supervising any employees.

25 What you haven't heard is that he doesn't make the

1 decisions. He can't make decisions. Someone else sets the  
2 schedule; it's the owner/architect.

3 *Gotlieb* went through all this and said when you are  
4 a general contractor who has one guy out there --

5 THE COURT: This is a district court case?

6 MR. HEAD: I'm sorry, it's a federal district court  
7 case. It was a bench trial after denying summary judgment,  
8 and the judge ruled --

9 THE COURT: Who was the judge?

10 MR. HEAD: I will pull the decision for you right  
11 here.

12 Judge Graham down in the Southern District of  
13 Florida back in 2006. The first thing he did was denied  
14 summary judgment, and then he held a bench trial. Then  
15 Judge Graham went through extensive findings of fact and  
16 conclusions of law, which are helpful because usually you  
17 don't get that from a jury verdict.

18 And he said what you have here is you have a  
19 general contractor who has one laborer out there on the site;  
20 the guy never goes to the office, he only goes to the job  
21 site; his job is to be out there from start to end, and if  
22 the subcontractors show up, then he's keeping an eye on what  
23 they are doing, and he's responsible for certain labor there,  
24 clean up, moving things around.

25 When the subcontractors don't do their job right,

1 his job is either to get them to come back and fix it or he  
2 does the work himself. When the subcontractor doesn't show,  
3 he does the work himself.

4 And what *Gotlieb* said is in this situation, this --  
5 somebody else sets the entire project schedule. A project  
6 manager sets the entire project schedule, and someone else,  
7 the project manager and the owner, make the contracts with  
8 the subcontractors and provide him with the list of approved  
9 contractors.

10 So at this point you are the guy on the site, you  
11 have got a list of you can only use these subcontractors for  
12 this job, and you have got a schedule that says you need the  
13 grading subcontractor for this two-week period. You look at  
14 this and you look at that and you tell them to be on the  
15 site.

16 The problem I have in this case and why I'm sitting  
17 here in your chambers in January rather than here on some  
18 sort of motion regarding settlement is that it wasn't until  
19 December 23rd that defendant let its counsel look at its  
20 records of the construction logs where my client was  
21 writing down here is what I did and here is the hours that  
22 I worked.

23 Up until that point, up until December 23rd, what  
24 I'm hearing from counsel is, We don't have any records of his  
25 hours worked, we don't believe he worked those hours

1 worked.

2 Now I think defendant's counsel would agree that  
3 the only records that the defendant have shows in-and-out  
4 times for my client on the job sites and supports my client's  
5 calculation. But until December 23rd, I never received an  
6 offer from the plaintiff.

7 We're now finally at a point where at least  
8 defendant knows that its records support plaintiff's hours.  
9 We are not at the point where we have reached a settlement  
10 that we should have reached back in September that says this  
11 is a small case, it's a total of thirty-nine thousand  
12 dollars, it's a single plaintiff. Our records, the  
13 defendant's records, support his calculations.

14 THE COURT: Well, you haven't reached a settlement,  
15 because the report I got was it wasn't resolved. So we are  
16 going to trial.

17 MR. PEREZ: Correct.

18 MR. HEAD: That's correct.

19 MR. PEREZ: Could I clarify just so -- there were a  
20 couple issues that were brought up. One, we did not --

21 THE COURT: I'm really not --

22 MR. PEREZ: Oh, I'm sorry.

23 THE COURT: All I want to do is get the case  
24 discovered so that we can try it.

25 How many -- so you want these green books for the

1 other projects during the relevant period?

2 MR. HEAD: Yes.

3 THE COURT: Produce those. I'm going to give you  
4 until -- how thick are green books?

5 MR. PEREZ: They can be a couple -- you know, an  
6 inch or two thick.

7 THE COURT: Well, however you want to do that,  
8 either make them available, but if you just want to copy  
9 them, so long as you produce the copies by 9:00 on Friday,  
10 that's fine with me.

11 All right. Next, we are on 19 now, any Department  
12 of Labor investigations or documents from them about  
13 overtime. You say there weren't any documents. I assume  
14 your production is complete because you didn't have anything  
15 to produce?

16 MR. PEREZ: Correct.

17 THE COURT: All right. Twenty is not a proper  
18 request, so I'm not going to require you to do that. This is  
19 discovery; it's not trial preparation.

20 Next is 21. Have you or are you going to produce  
21 these insurance policies?

22 MR. PEREZ: No, defendant does not possess  
23 responsive records to that request.

24 THE COURT: All right. So that production is not  
25 an issue.

1           Twenty-two, it seems an awful lot like stuff that  
2 would be in a personnel file.

3           MR. HEAD: Sometimes they keep a separate  
4 unemployment file. That's why you have (a), they don't keep  
5 it in the personnel file.

6           (b) should be in the personnel file, but sometimes  
7 the supervisor keeps a separate file. And I've run into them  
8 saying, Well, it wasn't in his --

9           THE COURT: Their response is that they are going  
10 to make this production. So any additional documents that  
11 are required to be made have to be produced by tomorrow at  
12 noon.

13          MR. PEREZ: We will do that.

14          MR. HEAD: Twenty-three, I don't think -- he says  
15 there is no documents.

16          THE COURT: Okay. Twenty-four?

17          MR. HEAD: Twenty-four is asking for the personnel  
18 files and the related documents for the site  
19 superintendents. That's something we were just addressing.

20                 If I could narrow this to one issue, I heard  
21 Mr. Perez continue to make the professional exemption  
22 argument. So what you do is you have to show not only that  
23 the plaintiff wasn't required to have a contractor's license  
24 or any real license in order to have this job, but that the  
25 other site superintendents were not as well.



1           So I would want to see their applications and  
2           anything that says, Here is -- I have a high school diploma  
3           and I don't have any contractor's license. That kind of  
4           information is relevant.

5           THE COURT: Why would that not be in the  
6           application for employment?

7           MR. HEAD: It would. I think what you ruled before  
8           was only as to the witnesses that he had listed, but you  
9           didn't order -- this one is asking for the site  
10          superintendents.

11          THE COURT: So you want for the site  
12          superintendents their applications for employment?

13          MR. HEAD: Job applications.

14          THE COURT: All right. Produce those.

15          MR. PEREZ: We will do that.

16          MR. HEAD: Or anything relating to certification or  
17          anything -- the basis of a professional exemption.

18          THE COURT: Well, I don't know what that means. So  
19          to the extent that they have applied for licenses or there is  
20          any information about licenses or certifications they have,  
21          you should produce that.

22          MR. PEREZ: We can do that, Your Honor.

23          THE COURT: What else? Will that do it?

24          MR. HEAD: To the extent that they had any time  
25          records.

1           Again, sometimes you get the defendant saying,  
2       I didn't know that my site superintendents were working this  
3       number of hours. If the site superintendents were telling  
4       them in their own records, I'm out there twelve hours a day,  
5       I would like to see that.

6           You have ordered them to produce the green  
7       book. That's where it's most likely recorded. I don't know  
8       that they recorded it -- they might have recorded it on their  
9       daily logs, which is something separate.

10          But I think if you narrowed it to any documents  
11       related to hours worked by the site superintendents, that  
12       would get me where I need to be.

13          MR. PEREZ: And I guess our only concern,  
14       Your Honor, is just that even though there are only a certain  
15       number of site superintendents, I mean, each project can  
16       contain dozens of boxes that may relate to their project, and  
17       it's somewhat time consuming and duplicative for them to have  
18       to go through all these records and try to determine, Well,  
19       you know, where did -- maybe the superintendent scribbled  
20       down some hours here or there. Other than perhaps the green  
21       book which we have already agreed that we will produce, I  
22       mean, there are thousands of documents --

23          THE COURT: Well, go back -- what he's talking  
24       about is were they aware that they were paying them for  
25       periods of time longer than the regular work hours.

1           So go to your -- I guess go through their personnel  
2 files and see if there are any records showing the hours that  
3 they actually worked which I guess would show that they were  
4 on notice that they were working more than eight hours a day,  
5 and go to the payroll people and see if they have any records  
6 showing what hours they worked within their pay system.

7           MR. PEREZ: And the way the pay system was set up,  
8 you know, they were paid on a salary, all the employees, so  
9 there would not be a record of hours --

10          THE COURT: So I want you to go back and -- you  
11 never know what they have. So go back and just see if they  
12 have any record of the actual hours claimed to have been  
13 worked.

14          And in saying that, Mr. Head, that gets you the  
15 comparison that you need. Would you agree with that?

16          MR. HEAD: Okay. Twenty-five, I believe he said  
17 there is no documents responsive.

18          THE COURT: Okay. So you are satisfied with what I  
19 have ordered in response to 24?

20          MR. HEAD: I'm sorry, yes, Your Honor.

21          THE COURT: Okay. And 25, what's the relevance of  
22 25?

23          MR. HEAD: Sometimes what you would get -- let me  
24 use the fire station example. The City of Atlanta has a  
25 compliance office. Mooney is the general contractor. They

1 have a subcontractor. Let's say it's a grading subcontractor  
2 that is out there to do grading work.

3 The grading subcontractor doesn't do his job as  
4 required, and the plaintiff has to do the manual labor.  
5 Let's say two days in a row, the plaintiff finishes up the  
6 grading job.

7 Mooney will then sometimes present a bill to the  
8 subcontractor, it's called a charge-back, and it will say,  
9 Hey, my guys had to do the labor that you were supposed to  
10 do, so you owe me back three thousand off of your contract  
11 fee.

12 That would be an example of some document presented  
13 by the defendant to another person that relates to the  
14 plaintiff's work that is saying here is the work.

15 THE COURT: Well, maybe not.

16 I mean, I don't mind you asking -- I mean, that is  
17 a little far-fetched to me, that you would get a charge-back  
18 document that -- because you are saying, Well, because he was  
19 there, it must relate to this plaintiff's work, so we get all  
20 of those. I think you have to be more specific about what  
21 you want.

22 If there are documents that say, The reason why we  
23 are doing this is because the management of the project by  
24 the site superintendent caused us to incur additional  
25 expenses or whatever it might say, but -- because this

1 request as you have just described it would mean all  
2 communications relating to the project would relate to the  
3 plaintiff because it was his project.

4 MR. HEAD: That's not what I'm looking for and not  
5 what --

6 THE COURT: I didn't think so, but that's what you  
7 said.

8 MR. HEAD: I understand.

9 THE COURT: So --

10 MR. HEAD: Should we try to tackle this -- this is  
11 also covered in a later one that speaks specifically about  
12 charge-backs, although I think I call them fall-backs.

13 THE COURT: I'm just trying to get you to  
14 articulate proper requests, and I'm giving you an enormous  
15 amount of time to do something which frankly you should have  
16 done yourself. But we are going to get this done today  
17 because the case is going to move forward.

18 So what is it -- and you have got to do a better  
19 job than you just did as far as what you are asking for in  
20 25.

21 MR. HEAD: Okay. If there is anything that the  
22 document gave to another employee or a contractor relating to  
23 plaintiff's job duties performed for the defendant.

24 THE COURT: So there would have to be a reference  
25 about how the plaintiff did his job --

1 MR. HEAD: The plaintiff had to do X.

2 THE COURT: -- or something that he was supposed to  
3 do and didn't do?

4 So if there are any documents that discuss -- that  
5 was given to an employee or to a contractor that mentions or  
6 refers to the plaintiff and the performance of his duties,  
7 whether good or bad, you should produce that.

8 MR. PEREZ: We can do that, Your Honor.

9 THE COURT: All right.

10 MR. HEAD: I don't think we have any dispute about  
11 26, which is --

12 THE COURT: All right.

13 MR. HEAD: -- policy manuals.

14 And No. 27, I don't believe that there are any  
15 documents.

16 THE COURT: Okay. What's the next one in dispute?

17 MR. HEAD: No. 28 is documents relating to the  
18 other benefits paid to or available to defendant's employees  
19 in the same or similar position. What you are looking for  
20 there is kind of their leave policies.

21 In exemption cases, you often lose the salary  
22 deduction because you are telling people, If you, you know,  
23 miss a half a day, I'm going to deduct your salary. And that  
24 often comes up in leave communications, leave  
25 documents. That's basically what I'm looking for.

1           THE COURT: You probably have already done this,  
2 but you have already said you are going to make those  
3 available?

4           MR. PEREZ: Correct, Your Honor. If there are any  
5 policies that relate to that, certainly they are available  
6 for inspection.

7           THE COURT: Well, no, see, he wants you to go  
8 through all the files and look for every single scrap of  
9 paper where somebody might have written a note that relates  
10 to this, which is why this is too broad.

11          MR. HEAD: Where you will see this is --

12          THE COURT: The problem I'm having with the way  
13 that you approach this is you are saying, Here is the sort of  
14 thing that might be out there, but here is what your request  
15 is: Produce all documents reflecting benefits, including but  
16 not limited to health, welfare, pension, disability, vacation  
17 and sick leave, that are available to defendant's employees  
18 in the same or similar position which plaintiff worked for  
19 defendant, including all costs for such benefits and whether  
20 paid by you or paid by the employee.

21                So this -- so, first of all, I guess this would  
22 have to be something that is maybe accessed by the  
23 defendant's employees, so communications between the company  
24 and its insurer, those would not be required to be  
25 accessed.

1           So if there are any documents that an employee can  
2 go to in a library or in a manual that reflects their  
3 benefits, what they get paid, then you should produce those,  
4 which you have agreed to produce them. You probably read  
5 this more carefully than I did.

6           So there is no dispute about that now that it's  
7 qualified by only those things that are available to  
8 employees.

9           And I'm reading that to mean available to all the  
10 employees as opposed to something that might be uniquely  
11 available to the president of the company that is not  
12 generally available to the work force.

13           All right. Twenty-nine, you have agreed to make  
14 those available. So to the extent that there are any, they  
15 have to be produced no later than 12:00 tomorrow.

16           I guess there are no documents relating to  
17 petitions or complaints. Let's make sure that's an accurate  
18 representation, that no documents exist, and therefore your  
19 production is complete.

20           MR. HEAD: Thirty-one I think we have already  
21 covered by talking about e-mails where you narrowed it to  
22 e-mails relating to plaintiff's job duties or work performed  
23 and hours worked, that kind of thing.

24           THE COURT: Thirty-two -- all right, there is no  
25 responsive documents, so that's not an issue.



1           Thirty-three?

2           MR. HEAD:   Thirty-three is a catchall.

3           THE COURT:   I don't think that's a proper request  
4   anyway, even as a catchall.   But they say that there aren't  
5   any additional documents other than those they have already  
6   produced or will produce, so that's not an issue.

7           There are no responsive documents to 34.

8           Let's go to 35.   They agreed to produce those.

9           So what's the next one in contention?

10          MR. HEAD:   Okay.

11          THE COURT:   35, 36, 37, they said they either don't  
12   have it or they are producing.   Where is the next dispute?

13          MR. HEAD:   Looks like 38.

14          Okay, in 38 I say -- first of all, Your Honor, in  
15   their initial disclosures, defendant is saying, We are owed  
16   our fees and costs in this case.   I frankly disagree with  
17   that, and the Fair Labor Standards Act has a prevailing  
18   plaintiff attorneys' fee statute.   But that said, they have  
19   made that claim.

20          So what 38 says is -- it's both an offensive and  
21   defensive request.   It says give me your fee agreement and  
22   your invoices --

23          THE COURT:   I think I decide this anyway, don't I?  
24   I think I decide the question of attorneys' fees?   Isn't that  
25   right?

1           MR. HEAD: You do. And here is where I get  
2 burned. You decide that after the close of discovery and  
3 after whatever judgment is issued.

4           THE COURT: Right.

5           MR. HEAD: And what I have had happened is I say,  
6 Okay, they are now contesting the reasonableness of my hours  
7 that I spent on these crazy discovery disputes, and I say, I  
8 would like to see their records, because they will show that  
9 we put all these documents into a discovery dispute and their  
10 hours are fifty hours and my hours are fifty hours.

11           The court -- sometimes the court will say to me,  
12 Well, you didn't ask for them in discovery, and discovery is  
13 closed, so you don't get them.

14           THE COURT: The defendants attorneys' fees  
15 records?

16           MR. HEAD: Right.

17           THE COURT: Even when they wouldn't be entitled to  
18 attorneys' fees? Are you saying that some court has said  
19 that you are entitled to opposing counsel's attorneys' fees  
20 to determine reasonableness of the expenses?

21           MR. HEAD: Yes, Your Honor.

22           In fact, the Eleventh Circuit in the *Henson* case in  
23 1985 said so, and then Judge Carnes in 2007 said so. Because  
24 what --

25           THE COURT: Let me see those.

1 MR. HEAD: Sure.

2 I'm going to find and highlight where Judge Carnes  
3 was covering it here.

4 THE COURT: Well, this is the circuit saying that  
5 it could be. This happened to be a ten-year case.

6 MR. HEAD: Here is a 2007 one that's citing a  
7 '97 --

8 THE COURT: Well, this is the one I'm bound by, the  
9 Eleventh Circuit.

10 MR. HEAD: Right. I'm sorry, Your Honor.

11 THE COURT: This is Judge Carnes --

12 MR. HEAD: I was saying Judge Carnes was citing a  
13 '97 Eleventh Circuit decision that was compelling discovery  
14 on the plaintiff's fee agreement.

15 THE COURT: Well, I'm not saying that there might  
16 not be an occasional case where that's appropriate, but it  
17 seems to me that why do that now? We can decide the  
18 attorneys' fees issue, and if you need additional information  
19 at a later date --

20 MR. HEAD: The best resolution then would be just  
21 to say, okay, I made the request. We will postpone until  
22 unless and until I'm entitled to fees.

23 THE COURT: I will deal with what you guys need if  
24 we ever get to that part, and we will give you the time to do  
25 that.

1 MR. HEAD: But I have seen some district court  
2 decisions saying because you didn't ask for it in discovery,  
3 you can't ask for it now at the postjudgment stage. So  
4 I just don't want to be caught in that situation.

5 All right. So 38 we will defer.

6 You asked what else we still have an objection  
7 on. Looks like 39, these are the back-charges I was talking  
8 about before. I called it back-charges unfortunately. I  
9 don't think there is any confusion what I was asking for.

10 There was actually one submitted to the City of  
11 Atlanta on one of these projects, but it was not for work  
12 that the plaintiff performed; it was work performed by the  
13 site superintendent after him.

14 But it's relevant to show that, number one,  
15 defendant knows that its site superintendents are doing the  
16 actual construction labor and, even worse, defendant is  
17 requiring the subcontractor to pay them.

18 THE COURT: If on these two projects there were  
19 other back-charge submissions evidencing work by site  
20 superintendents, you should produce those.

21 MR. PEREZ: On those two projects, on the two  
22 projects that plaintiff Brackett had worked on?

23 THE COURT: Yeah, but even if he wasn't the one  
24 responsible for it, if some other site superintendent did the  
25 work, I want those produced as well.

1 Does that do it?

2 MR. HEAD: Your Honor, I hear your ruling. I don't  
3 know of any reason that it would be limited to the project,  
4 because it goes to defendant's knowledge of what its site  
5 superintendents --

6 THE COURT: So you want them to do it for every  
7 project for half a decade?

8 MR. HEAD: It would be very easy. All you have to  
9 do is ask the defendant, Which back-charges did you make? I  
10 mean, they keep those. They had to submit them in a  
11 proceeding with the compliance officer, so you submit a --  
12 basically you are coming before this compliance officer, you  
13 are the general contractor, you have got the subcontractor  
14 there, and you are asking the compliance officer to sign off  
15 on your back-charge.

16 THE COURT: All right. Could you see if any of  
17 those exist for projects from January 1st, 2008, to the  
18 present?

19 MR. HEAD: Forty, I have heard counsel say that  
20 they will be producing the green books for the two sites.

21 THE COURT: Right. So that's not in dispute  
22 anymore?

23 MR. HEAD: Right, except for that we also  
24 haven't received the daily logs, but I haven't heard any  
25 objection to the daily logs for the other site as well.

1           There is two things, there is the green book and  
2           there is daily logs.

3           THE COURT: All right. You are going to produce  
4           the daily logs?

5           MR. PEREZ: Yes, Your Honor.

6           THE COURT: All right. Next?

7           MR. HEAD: Forty-one, we haven't gotten them yet,  
8           but I believe that they are producing them.

9           THE COURT: You are producing those, the owner and  
10          architect's schedule for these two job sites?

11          MR. PEREZ: Yes, Your Honor.

12          MR. HEAD: I don't think there is any objection to  
13          producing 42, 43.

14          As to 44, it just looks like we have got some  
15          confusion between counsel, because counsel is telling me  
16          these are in the files that I have already reviewed, and the  
17          files I reviewed didn't have stop-work notices. But it's  
18          easily resolved if the defendant says we will produce  
19          stop-work notices.

20          MR. PEREZ: I did advise my client of that issue,  
21          and they said that it should have been in the file, and they  
22          are going to go back to ensure it. If it's not there, they  
23          will make sure they find them.

24          THE COURT: All right. Forty-five?

25          MR. HEAD: I don't think you have any objection to

1 producing those, Attachment C, do you?

2 MR. PEREZ: No, no objection.

3 THE COURT: And 46, they are going to produce those  
4 too.

5 MR. HEAD: Okay.

6 THE COURT: Who are the people that you want to  
7 depose, Mr. Head?

8 MR. HEAD: I have asked to depose Jerry Lyons, he's  
9 the project manager, and then Timothy Mooney, who from what I  
10 can tell from the corporate disclosures is the sole owner and  
11 sole corporate officer.

12 THE COURT: Okay. Who else?

13 MR. HEAD: And then they have just identified two  
14 days ago a current employee named Billy Humphreys, but I  
15 haven't yet received his contact information to attempt to  
16 talk to him to see what he has to say. I usually like to try  
17 and talk to a witness --

18 THE COURT: Who else?

19 MR. HEAD: They have --

20 THE COURT: You say he's a current employee?

21 MR. HEAD: He's a current employee, but I don't  
22 think they are claiming that he's management.

23 MR. PEREZ: No.

24 MR. HEAD: And then as for depositions, I would  
25 prefer to stop at that. It's a small case. There are other

1 folks they have identified, but that's all --

2 THE COURT: And who do you want to depose?

3 MR. PEREZ: Just plaintiff Brackett.

4 THE COURT: Okay. You want to depose -- so what  
5 was the order that you had before for the witnesses?

6 MR. HEAD: We were supposed to have Lyons today,  
7 plaintiff tomorrow, Mooney on Friday.

8 There is an asterisk next to Mooney because, as  
9 alluded to yesterday, the defendant has objections to  
10 Mooney's deposition. But that was the order.

11 THE COURT: So when is Mr. Lyons available?

12 MR. PEREZ: He said at the earliest by Friday.

13 THE COURT: What does by Friday mean?

14 MR. PEREZ: I mean he will be available Friday.

15 THE COURT: Okay. He gets deposed on Friday.

16 MR. HEAD: Your Honor, if I could, I really would  
17 like the opportunity to receive and review the documents with  
18 my client before deposing Lyons if we are going to extend the  
19 time?

20 THE COURT: All right. Depose Lyons next  
21 Wednesday, depose the plaintiff on Thursday, depose  
22 Mr. Mooney on Friday, and Mr. Humphreys on Monday.

23 MR. PEREZ: And can defendant make an argument of  
24 Mr. Mooney's deposition or --

25 THE COURT: If he's the sole owner, no, he gets



1     deposed.

2             MR. PEREZ:   Okay.

3             THE COURT:   But I mean, I will be available all  
4     those days.   If you think that the deposition is becoming  
5     abusive, stop it, call me, and I will hear what has been  
6     covered, and I will determine whether or not it was abusive  
7     or not.

8             MR. PEREZ:   Okay.   And just so that I confirm,  
9     Mr. Lyons will be deposed next Wednesday, Mr. Brackett will  
10    be deposed next Thursday, Mr. Mooney Friday, and then the  
11    following Monday Mr. Humphreys?

12            THE COURT:   Right.

13            Okay.   Anything else?

14            MR. HEAD:   Send us back to mediation Monday or  
15    Tuesday next week.

16            THE COURT:   I have done that already.   I'm not  
17    going to waste Judge Baverman's time anymore.

18            MR. HEAD:   Okay.

19            THE COURT:   What else?

20            MR. HEAD:   You had mentioned an extension of the  
21    discovery period.   Do we want to stick with that or do you  
22    want --

23            THE COURT:   Well, I mean, I think I have  
24    effectively extended it if you are not going to get finished  
25    until the following -- a week from Monday.

1 MR. HEAD: You had announced the 22nd. I don't  
2 know if we want to set a different date now?

3 THE COURT: Well, I think it makes more sense to  
4 get you pinned down, because I don't have a lot of confidence  
5 of you working things out amongst yourselves.

6 So this is all the discovery I understand that you  
7 want, so if we have nailed these times down, whatever that --  
8 what is that? That's the 18th anyway.

9 So I mean, if there is -- something happens,  
10 somebody gets sick or we have to go beyond that, I will  
11 consider that. But I would like -- this is the order that  
12 you want, it gives you enough time to review the documents  
13 that you want, it gets the case -- you get an extension  
14 effectively by agreeing to these dates. But if we have to  
15 adjust it a little bit, so long as people stay in this order,  
16 I guess I would allow a few more days. But we have got to  
17 get it over with.

18 Now, Mr. Perez, what's happened in the last two  
19 cases we have had is that there has been a Pyrrhic victory by  
20 the plaintiff and the defendant finds out that there is a big  
21 attorneys' fees award, and you have just incurred some more  
22 attorneys' fees.

23 MR. PEREZ: That's correct.

24 THE COURT: And your client needs to know, I mean,  
25 two ways. One is he's now going to have to pay for some

1 amount of money because he wasn't -- because he thought that  
2 he could save some money. He's obviously not saving money by  
3 his conduct.

4 MR. PEREZ: Correct.

5 THE COURT: And second, that the more that's  
6 invested in a low-amount case, if they believe they have a  
7 strong principle they need to advocate, the risk of course is  
8 even if they win -- well, if they don't win, in this case  
9 they are going to have to pay maybe some small amount of  
10 money but probably big attorneys' fees.

11 MR. PEREZ: Correct.

12 THE COURT: Or bigger than they want to pay. So  
13 they are just going to have to make some business decisions.

14 MR. PEREZ: I will say, Your Honor, that we did  
15 submit a Rule 68 offer for the amount of money, back wages  
16 that we feel that the plaintiff would be entitled to even  
17 based on his own hours of work that he's recorded, and one  
18 of the main sticking points between both parties resolving  
19 this issue is the proper method of calculation for that  
20 overtime.

21 We contend that the proper remedial measures since  
22 he was paid a salary is that that salary compensated for all  
23 hours worked, and therefore you derive the regular rate by  
24 dividing that total compensation by the total amount of hours  
25 that he worked in a week, which means we have already --

1 THE COURT: I don't need -- they have rejected  
2 that.

3 MR. PEREZ: They rejected it, and so their amount  
4 comes out to about five times greater than the amount that we  
5 believe is legally entitled to him.

6 So we believe we made a fair offer based on the  
7 actual legal principles that were decided, they have rejected  
8 that offer, and we have issued a Rule 68 based on that number  
9 to end, you know, the accumulation of attorneys' fees going  
10 forward.

11 And that is a legal issue that we would like to  
12 bring to your attention at a summary judgment type motion  
13 also to see if perhaps at that stage, if you make a ruling on  
14 that decision, we would be able to settle this case I feel  
15 one way or the other.

16 THE COURT: I don't know and I don't want to know  
17 what the offers are, but how far apart are you?

18 MR. PEREZ: Significant. As I mentioned before,  
19 it's about a five times difference when they don't give us  
20 credit for that, the straight time we've already paid.

21 THE COURT: It's only a seven-month employment.

22 MR. PEREZ: Correct. His total earnings there were  
23 about \$33,000, and they are asking for \$39,000 in overtime.

24 Based on our proper calculation, even using his  
25 number of hours and liquidating, comes out to be roughly

1 about \$7,500.

2 THE COURT: All right. So --

3 MR. HEAD: I don't think you want to --

4 THE COURT: I am done with it. You know, I'm done  
5 with it.

6 Anything else we need to cover?

7 MR. HEAD: The plaintiff respectfully disagrees  
8 with the summary of the settlement to date.

9 THE COURT: What I was asking is when you went to  
10 Judge Baverman, how many dollars were you apart?

11 MR. PEREZ: Oh, I think our final number was --

12 THE COURT: I don't want to know your number. Just  
13 what's the difference? What was the gap?

14 MR. HEAD: Could I be heard?

15 MR. PEREZ: It was like thirty, forty thousand, I  
16 guess. Well, maybe thirty thousand.

17 MR. HEAD: The gap we have, number one, is  
18 defendant would like to cap and not pay the attorneys' fees  
19 incurred up to this point.

20 THE COURT: I just want to know what the gap is.  
21 I don't want to know how the gap is created. But if it's a  
22 thirty thousand dollar gap --

23 MR. PEREZ: I think it was about thirty thousand.

24 THE COURT: -- the case will be tried. I look  
25 forward to doing it.

1 MR. PEREZ: And we look forward to helping you  
2 learn more about FSLA and overtime issues.

3 THE COURT: I'm going to keep this discovery just  
4 so I have it in my file.

5 MR. PEREZ: Oh, Your Honor, just to confirm and  
6 then just to let you know, certainly I have got my client on  
7 board with this discovery process, and I am going to be  
8 available to show up to their office today certainly, if  
9 Mr. Head is available to conduct that inspection this  
10 afternoon. And I will be able to oversee that process to  
11 ensure that everything gets done according to the schedule,  
12 and for tomorrow and Friday as well.

13 THE COURT: Great.

14 MR. PEREZ: Thank you so much, Your Honor, for  
15 helping us with this matter.

16 THE COURT: You are welcome.

17 (Proceedings adjourn at 1:21 p.m.)  
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## C E R T I F I C A T E

UNITED STATES OF AMERICA :  
:  
NORTHERN DISTRICT OF GEORGIA :

I, Nicholas A. Marrone, RMR, CRR, Official Court Reporter of the United States District Court for the Northern District of Georgia, do hereby certify that the foregoing 71 pages constitute a true transcript of proceedings had before the said Court, held in the city of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 7th day of January, 2010.

*/s/ Nicholas A. Marrone*

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NICHOLAS A. MARRONE, RMR, CRR  
Registered Merit Reporter  
Certified Realtime Reporter  
Official Court Reporter  
Northern District of Georgia